

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	DECISION
In the Matter of Protests of:)	
)	CASE Nos. 2010–115 & 2010-116
First Choice Medical Supply, LLC)	
)	
Grove Medical, Inc.)	
)	
)	
Materials Management Office)	POSTING DATE: August 23, 2010
IFB No. 5400001105)	
)	MAILING DATE: August 23, 2010
<u>Statewide Medical Supplies</u>)	

This matter is before the Chief Procurement Officer (CPO) pursuant to letters of protest from First Choice Medical Supply, LLC (First Choice) and Grove Medical, Inc. (Grove). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure a statewide term contract with two vendors for medical supplies. In the letters, First Choice and Grove protested MMO's notice of intent to award to Cardinal Health 200, Inc.¹

In order to resolve the matter, the CPO conducted hearings on July 27, 2010 and August 11, 2010. Appearing before the CPO were First Choice, represented by Wade Mullins, Esquire; Grove, represented by John Schmidt, Esquire; Cardinal Health 200, LLC, represented by Elizabeth Crum, Esquire; and MMO, represented by John Stevens, State Procurement Officer.

NATURE OF PROTEST

The letters of protest are attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On August 10, 2009, MMO issued the IFB. (Ex. 1)
2. On August 24, 2009, MMO conducted a pre-bid conference.

¹ This is the third set of protests of the awards resulting from this procurement. See Findings of Fact for details.

3. On August 25, 2009, MMO issued Amendment No. 1. (Ex. 2)
4. On September 8, 2009 MMO issued Amendment No. 2. (Ex. 3)
5. On September 14, 2009, MMO issued Amendment No. 3, which made substantial alterations to the solicitation. (Ex. 4)
6. On October 2, 2009, MMO issued Amendment No. 4. (Ex. 5)
7. MMO opened the bids received on October 20, 2009.
8. On October 26, 2009, MMO posted its intent to award to Grove and Medline Industries Inc. (Medline).
9. MMO posted a corrected intent to award to Grove and Medline on October 27, 2009.
10. The CPO received the protests of First Choice and Cardinal Health on November 3 and 4, 2009 respectively.
11. Following hearings, the CPO issued a Decision granting the protests as to Medline and canceling the award to Medline. The CPO also denied the protest as to Grove. His Decision was not appealed, and the award to Grove proceeded.
12. MMO canceled the award to Medline on January 21, 2010.
13. MMO posted an intent to award to First Choice on February 9, 2010.
14. On February 18, 2010, Cardinal Health 200, Inc. filed a protest.
15. Following a hearing, the CPO issued a Decision granting the protest and canceling the award to First Choice.
16. On April 20, 2010, MMO posted an intent to award to award to Cardinal Health 200, Inc. (Ex. 6)
17. On the same date, MMO posted a corrected award to Cardinal Health 200, Inc. (Ex. 7)
18. First Choice and Grove filed the current protests on April 30, 2010.

PROTEST ALLEGATIONS

First Choice and Grove (Protestants) raise the following allegations:

1. The procurement officer's determination that Cardinal Health 200, Inc. was a responsible bidder was arbitrary, capricious and erroneous as a matter of law based on the following reasons:

- a. Cardinal Health 200, Inc. is not qualified legally to contract with the State of South Carolina (State) because it did not exist as a corporate entity and/or it was not registered to do business in the State at the time it submitted its bid through the present;
 - b. Cardinal Health 200, Inc. does not have a satisfactory record of performance and integrity because it knowingly sold medical supplies to state agencies after its contract expired or otherwise encouraged state agencies to purchase them off contract improperly; and
 - c. Cardinal Health 200, Inc., provided no financial information to support the determination.
2. Cardinal Health 200, Inc. improperly claimed the resident vendor preference based on the following:
 - a. Cardinal Health 200, Inc. did not exist as a corporate entity at the time it submitted its bid; and
 - b. Even if Cardinal Health 200, Inc. existed, Cardinal Health 200, Inc. cannot show that it maintains and owns an office in South Carolina and that it satisfies the product inventory requirement.

MOTION TO DISMISS

At the outset of the hearing, Elizabeth Crum, Esquire, who indicated that she represented Cardinal Health 200, LLC, formerly known as Cardinal Health 200, Inc., filed a motion for summary judgment requesting that the CPO rule on the issues based solely upon the protest letters. The CPO held the ruling in abeyance and proceeded with the hearings.

DISCUSSION AND CONCLUSIONS

On July 21, 2009, Cardinal Health 200, Inc., a corporation under the laws of Delaware, converted its corporate form to a limited liability company, under the laws of Delaware, named Cardinal Health 200, LLC. Further, the South Carolina Secretary of State's Office recognized the Delaware conversion. The majority of Protestant's allegations rest on their contention that at the time it submitted its offer on October 19, 2009, Cardinal Health 200, Inc. was a nonexistent entity due to the conversion and, therefore, was not legally qualified to contract.

According to the United States Comptroller General, a bid from a nonexistent entity cannot be considered responsive because upon acceptance of the bid no one would be bound to perform the IFB's work. Matter of National Foundation Company, Comp. Gen. Dec. B-253369 (1993). Further, an award to an entity other than the entity that submitted the bid could constitute an improper substitution of bidders. Id. However, where a bidder uses a slight variation in its name in bid documents, the bid is not defective so long as it can be established that the different names refer to the exact same entity. Matter of Knightsbridge Construction Corp., Comp. Gen. Dec. B-258366 (1995). Ultimately the determination of what legal entity is actually bound to the bid is a matter of responsiveness, not responsibility as characterized by Protestants. Matter of National Foundation Company. While federal protest decisions are not binding precedent in South Carolina, the CPO finds the reasoning persuasive and concludes that the proper analysis is one of responsiveness, as responsiveness is an issue of contract formation.

Specifically, Protestants allege that Cardinal Health 200, Inc., which is how the entity is identified on the face of the bid, had in fact dissolved when it converted and therefore did not exist when the bid was submitted and does not currently exist. In support of this allegation, Protestants offered argument and a screen print of the results of a search of the State of Delaware, Department of State: Division of Corporations' website for Cardinal Health 200, Inc. (Ex. 31). The results were "No matches found. Please try a new search." However, Protestants acknowledge that if Cardinal Health 200, Inc. had converted its form after receipt of the award it would not be an issue.

In contrast, Cardinal Health 200, LLC responded that it merely converted its corporate form from Cardinal Health 200, Inc. to Cardinal Health 200, LLC, a limited liability company, on July 21, 2009.² According to Cardinal Health 200, LLC, since the conversion occurred by "operation of law," it

² Despite Cardinal Health 200, LLC's tendency to interchange words, this conversion was more than a mere name change; it was a change to the form of the entity instead.

remained the same entity as before. In support of this contention, Cardinal Health 200, LLC points to Delaware law, which states that when a corporation converts to another business form the other business form that has been converted remains for all purposes the same entity as the corporation that existed before the conversion. Cardinal Health 200, LLC also denies that Cardinal Health 200, Inc. has been dissolved. Further, Cardinal Health 200, Inc. points out that South Carolina recognizes the corporate laws of other states. In addition, the South Carolina Office of the Secretary of State has certified that Cardinal Health 200, LLC has been registered to transact business in here since 1996.

Cardinal Health 200, LLC acknowledges that Jerry Bishop, who signed the bid, should have submitted the bid in the name of Cardinal Health 200, LLC but contends it was a mere scrivener's error. It also notes the state of incorporation was incorrectly listed on the bid as Ohio instead of Delaware. Brian James, regional manager for Cardinal Health 200, LLC, testified that he assisted with the preparation of the bid and had been unaware of the conversion until this Spring. He stated that he and Mr. Bishop merely cut and pasted the information from the bid they had submitted in 2008. According to Mr. James, the taxpayer identification number and the state vendor number are correct.

In further support of its argument, Cardinal provided the following documents:

- a Certificate of Conversion filed in, and authenticated by, the Delaware Secretary of State's Office and effective July 21, 2009 (Ex. 32-4);
- a Certificate of Formation filed in, and authenticated by, the Delaware Secretary of State's Office and effective July 21, 2009 (Ex. 32-4);
- its corporate resolution dated July 21, 2009 (Ex. 39);
- a Certification of Authorization from the South Carolina Secretary of State dated May 18, 2020 certifying that:

Cardinal Health 200, LLC, A Limited Liability Company duly organized under the laws of the state of DELAWARE, and issued a certificate of authority to transact business in South Carolina on August 28th, 1996, with a duration that is at will, has as of this date filed all reports due this office, paid all fees, taxes and penalties owed to the Secretary of State, that the Secretary of State has not mailed notice to the company that it is subject

to being dissolved by administrative action pursuant to section 33-44-809 of the South Carolina Code, and that the company has not filed a certificate of cancellation as of the date hereof (Ex. 32-3);

- Certification of the Certificates of Conversion and Formation by South Carolina's Secretary of State (Ex. 32-36);
- a certification of filings by the Delaware Secretary of State dated May 19, 2010 indicating that Cardinal Health 200, LLC is in good standing, has a legal existence and has not been canceled or revoked, and is duly authorized to transact business. This document further cites a long list of filings for Cardinal Health 200, LLC, from its Certificate of Incorporation filed in 1996 up to the aforesaid Certificate of Conversion and Certificate of Formation in July 2009 (Ex. 32-7);
- affidavits from Rylan Rawlins, Assistant Secretary for Cardinal Health 200, LLC;
- a Lancaster County tax record dated January 8, 2010 to Cardinal Health 200, Inc. (Ex. 32-8); and
- the Sales and Use Tax Return of Cardinal Health 200, LLC filed with the South Carolina Department of Revenue on April 8, 2010. (Ex. 30).

Since none of the parties provided sufficient evidence and there does not appear to be legal authority directly on point, the CPO must decide the allegation on the information available. The real issue is whether Cardinal Health 200, LLC can be legally bound, making the contract enforceable. Based on the only evidence provided, the CPO concludes that Cardinal Health 200, LLC is legally bound by the bid, which was submitted under Cardinal Health 200, Inc., for the following reasons:

Cardinal Health 200, Inc. converted or "transformed" into Cardinal Health 200, LLC. Therefore, Cardinal Health 200, LLC, is the complete successor in interest to Cardinal Health 200, LLC, and is the same entity for all intents and purposes. See I.D.Precision Components Corp., B-171959 (1971)(noting that bid transfers are to be avoided unless effected by operation of law to a legal entity which is the complete successor in interest to the original bidder); See generally, L-3 Communications Integrated Systems, L.P. v. U.S., 84 Fed.Cl. 768 (2008)(where transfer is incident to sale of entire business, the transfer occurs "by operation of law" and post-award protest of successor-in-interest entity is permissible). Cardinal Health 200, Inc. and Cardinal Health 200, LLC have the

same taxpayer identification number, which was included on the bid. According to testimony, they have the same management, employees and locations. There is no evidence that they were ever separate and distinct entities. See Matter of Ionics Inc., Comp. Gen. Dec. B-211180 (1984)(finding that where the latter corporation was merely a successor in interest to the former corporation and was not a separate and distinct entity there was no reason to object to the award to the latter). Even after the conversion, the Delaware Secretary of State documentation indicates that Cardinal Health 200, LLC has been in legal existence and authorized to transact business there continuously since 1996 even though it had altered its form as well as merged during that time. Likewise, the South Carolina Secretary of State's records list Cardinal Health 200, LLC as having been authorized to transact business in South Carolina since 1996. Further, there is no evidence that the conversion was tantamount to the sale of a bid, which is what this process seeks to avoid. See Matter of Mil-Tech, Comp. Gen. Dec. B-212385 (1984); Mil-Tech Systems, Inc. v. U.S., 6 Cl.Ct. 26 (1984).

In light of all the circumstances before the CPO, the State is permitted to recognize Cardinal Health 200, LLC as complete successor in interest and substitute it for Cardinal Health 200, Inc. prior to award. See Numax Electronics, Inc., Comp. Gen. Dec. B-181670 (1975)(where transfer of company's assets to another occurred after bid submission but before award, the practical aspects of the attempted substitution should be considered rather than taking an overly technical interpretation of the law.) Accordingly, Cardinal Health 200, LLC, formerly Cardinal Health 200, Inc., was responsive in this regard. Further, the misdesignation of the state of incorporation on the bid can be waived as a minor informality. See Matter of Transco Security, Inc., Comp. Gen. Dec. B-200470 (1981). Having addressed the overriding issue, the CPO will address each protest allegation in turn.

Was the procurement officer's determination that Cardinal Health 200, Inc. was a responsible bidder arbitrary, capricious and erroneous as a matter of law?

The issue raised before the CPO is whether Procurement Officer Theresa Watts' written determination that Cardinal Health 200, Inc., and consequently Cardinal Health 200, LLC was a responsible bidder was arbitrary, capricious, clearly erroneous or contrary to law pursuant to Section 11-35-2410 of the South Carolina Consolidated Procurement Code (Code). Protestants' allegation is based on three grounds: 1) Cardinal Health 200, Inc. is not qualified legally to contract with the State since it did not exist at the time the bid was submitted; 2) Cardinal Health 200, Inc. does not have a satisfactory record of performance and integrity because it knowingly sold medical supplies to state agencies after its contract expired or otherwise encouraged state agencies to purchase them off contract improperly; and 3) Cardinal Health 200, Inc., provided no financial information to support Ms. Watts' responsibility determination.

The Code defines a responsible bidder as "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." Section 11-35-1410(6) (Emphasis added). Only a responsible bidder may be awarded a contract. S.C. Code Ann. § 11-35-1520(10). According to the South Carolina Procurement Review Panel (Panel), "[a] procurement officer has an obligation to determine responsibility prior to award and may consider any source of information." Protest of CollegeSource, Inc., Case No. 2008-4; See also S.C. Code Ann. § 11-35-1810(1)(stating "[r]esponsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts.") Factors to consider in this determination include whether the bidder has:

- 1) available the financial, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to meet the contract's requirements;
- 2) a satisfactory record of performance;
- 3) a satisfactory record of integrity;
- 4) qualified legally to contract with the State. Reg. 19-445.2125 (A).

Unless there is a compelling reason to reject bids, the State must give notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements of the IFB. S.C. Code Ann. § 11-35-1520(10). Absent a showing that it is "clearly erroneous, arbitrary, capricious, or contrary to law," a procurement officer's determination regarding responsibility is a matter of discretion that will not be overturned. Protest of CollegeSource, Inc.; S.C. Code Ann. § 11-35-2410(A).

On April 20, 2010, Ms. Watts determined in writing that Cardinal Health 200, Inc. was a responsible bidder. (Ex. 12). [From this point forward, Cardinal Health 200, Inc. and consequently Cardinal Health 200, LLC will be referred to as Cardinal.] At the CPO hearings, Ms. Watts testified that she considered whether Cardinal had the financial, equipment, facility and personnel resources and expertise to perform the contract, whether it had satisfactory records of performance and integrity, and if it was qualified to contract with the State. According to Ms. Watts, Cardinal provided all the information that she requested. She noted that she did not request specific financials but instead utilized a Dunn and Bradstreet (DUNS) report. (Ex. 13) She testified that she personally had five to six years of actual experience working with Cardinal and had based a large part of her decision on Cardinal's long history of good performance. She also testified that she conducted reference checks with several large state agencies that had extended experience with Cardinal. All three of these state officials (Richard Lowman, Deborah Moore and Michelle Robinson) rated Cardinal's performance as "excellent" and when asked if they would hire Cardinal again they responded "yes," "absolutely," and "yes" respectively. (Ex. 12) Finally, Ms. Watts testified that MMO was provided with an allegation

that sales were being made by Cardinal to state agencies after February 19 when Cardinal was no longer a provider under the statewide term contract for medical supplies. She explained that she investigated the matter as part of her determination of responsibility by requesting documentation in relation to this issue from Cardinal. Cardinal responded to her request by providing written communications it had sent to the South Carolina Department of Health and Environmental Control and the South Carolina Department of Disability and Special Needs as well as a synopsis of verbal communications it had with the South Carolina Department of Mental Health (DMH) and the South Carolina Department of Corrections. (Ex. 11) Based on all the information before her, Ms. Watts testified that she found Cardinal to be responsible.

By way of background, as of February 20, 2010, Grove was the sole vendor on this statewide term contract. MMO had advised agencies that Cardinal no longer held the contract. (Ex. 17, 18, 19, 20, 23, 25, 26, 27.) The Code defines such a “term contract” as a contract “established by the chief procurement officer for specific supplies, services, or information technology for a specified time and for which it is mandatory that all governmental bodies procure their requirements during its term...” S.C. Code Ann. § 11-35-310(35). However, the award of the contract did not guarantee 100% of the state’s purchases of medical supplies to Grove, which complicates the CPO’s determination.

According to the Code,

if a public procurement unit is offered the same supplies, services, or information technology at a price that is at least ten percent less than the term contract price, it may purchase from the vendor offering the lower price after first offering the vendor holding the term contract the option to meet the lower price...If the vendor holding the term contract meets the lower price, then the governmental body shall purchase from the contract vendor. All decisions to purchase from the vendor offering the lower price must be documented by the procurement officer in sufficient detail to satisfy the requirements of an external audit. Section 11-35-310(35).

Likewise, the IFB reads, “If the state is offered the exact same item on the exact same terms and conditions as those provided under this contract by a vendor other than the contractor (the “alternate

vendor”) for a price that is at least ten percent less than the contract price, the state may purchase these items from the alternate vendor if the contractor does not agree to meet the offered price.” (Ex. 4, p. 22, Acceptance of Offers 10% Below Price) The IFB added other “exclusions” as well including:

- The contractor must notify the ordering agency when an item is out of stock. The State reserves the right to procure out of stock items from other sources in these situations...In the event that a contract item is out-of-stock, as is needed by the agency/facility, and neither contractor is able to supply the product within the requested time frame, the agency may purchase the product on the open market. (Ex. 4, p. 14, Out of Stock/Returns)
- Standard deliveries will be made within (3) three business days after receipt of order (establishing a contractual requirement for delivery). (Ex. 4, p. 13, Delivery and Freight Charges, subsection B)
- Users are not required to use this contract for orders less than one hundred dollars (\$100.00). Contractors are likewise not required to accept orders for less than that amount. (Ex. 4, p. 13, Delivery and Freight Charges, subsection C)
- To address the possibility of overlap in products that are often included in a Medical Supply Catalog and the catalogs currently being used in the separate contracts for statewide laboratory equipment, chemicals and supplies and statewide pharmaceuticals under the Minnesota Multi-State Cooperative, the following were also specifically excluded from this contract:
 - Capital equipment catalog items whose cost exceeds \$4,999.00 per units,
 - Products covered by the statewide Laboratory and Pharmaceutical contracts, and
 - Hospital beds, hospital furniture, and other like items (Ex. 4, p. 15, Exclusions)

Cardinal testified that it had advised agencies that it was no longer a statewide term contract holder and that there was presently only one vendor since the second award had not been made. (Ex. 11) Cardinal acknowledges that it has made sales of medical supplies to South Carolina state agencies since its contract lapsed. However, Mr. James contended that Cardinal had not knowingly made improper sales. Specifically, he argued that Cardinal was completing orders it received before its contract had expired, which was permissible, and engaging in new sales to agencies under the exclusions, such as when the 10% clause was met or when the existing contractor, Grove, could not meet stock or delivery requirements. Further, he testified that Cardinal acted to fulfill orders from the DMH under an emergency procurement declared by that agency, which was independent of the

statewide term contract. Finally, he argued that many of the orders were placed by state agencies over the internet without Cardinal's direct participation, which Cardinal could not prevent.

Despite Protestants' extensive use of the Freedom of Information Act to obtain documents of purchases made from Cardinal by state agencies after February 19, 2010, and the CPO's delay of the hearing in order to allow for full disclosure of the alleged sales, no conclusive determination of the amount of improper sales was presented to the CPO. Although the CPO allowed the parties great latitude in presenting their cases, the only sales relevant to this protest are those that are alleged to have occurred between February 19, 2010 and April 20, 2010. The analyses provided by the parties were insufficient to prove what, if any, improper sales Cardinal had made during this relevant period for some of the reasons stated below.

For example, the data utilized by Grove in its analysis is of payments made to Cardinal by the State, which was provided by the South Carolina Comptroller General. This data does not indicate the important information of when the orders were placed with Cardinal or the circumstance surrounding the orders. At a minimum, Cardinal had every right to fulfill orders placed with it by state agencies before its contract expired. Cardinal also had the right under the contract to sell medical products under the exclusions offered therein. Moreover, Melissa Selig, Controller for Grove who analyzed this data, testified that her analysis is based upon all tested orders to Cardinal that were not for pharmaceuticals with Centers for Disease Control numbers. However, the State's MMCAP contracts, which Cardinal delivers, include those pharmaceuticals as well as over the counter medications, which Ms. Selig did not factor into her analysis. (Ex. 44). Likewise, the Spending Transparency provided by Grove also does not reflect when the orders were actually placed or the circumstances behind them. (Ex. 33) Any analysis of this exhibit is further complicated by the fact that Cardinal is registered as a vendor with the State under nine different names. (Ex. 33)

Mr. James' analysis of Cardinal's sales was also flawed because it includes all types of sales of medical supplies to all entities eligible to use the state contract though not necessarily required. (Ex. 41) It also does not indicate whether these sales occurred based on one of the various exclusions. By closest estimate, the total sales made to Cardinal between February 20 and the end of April, which is beyond the date of Ms. Watts' determination, was \$132,552.36. However, Mr. James did not know under what circumstances these sales occurred. In addition, Mr. James explained that the sales to DMH were properly made under an emergency procurement. (Ex. 28) While Grove argues that the emergency determination is without merit, it did not protest that determination and instead seeks to use it as evidence that Cardinal was irresponsible. However, Grove offered no evidence and did not ask the CPO to request any DMH official attend the hearing to testify. Therefore, the CPO makes no determination here of the merits of the emergency.

Accordingly, the CPO finds no evidence that Ms. Watts acted arbitrarily, capriciously or contrary to law in her determination. The reasons for the Code's requirement that a procurement officer determine if a bidder is responsible is that the State can be assured that the bidder is capable of performance, can be trusted with performance and the contract is enforceable under the law. The Code does not require the procurement officer look beyond the information that is submitted in the bid to verify its accuracy. See generally, Protest of Travelsigns, Case No. 1995-8.

As detailed previously, whether Cardinal existed when it submitted its bid is an issue of responsiveness. Even if it also involves responsibility, the CPO finds that Protestants failed to prove that Cardinal did not exist and consequently was not qualified legally to contract with the State. Protestants also failed to prove that Cardinal failed to provide financial information as requested. Ms. Watts' did not request any specific type of financial information. Further, Protestants failed to prove that Ms. Watt's determination that Cardinal had a satisfactory record of performance was unreasonable.

The State has contracted with Cardinal since at least the late 1990s when it was called Allegiance. Cardinal has served the State successfully for many years. Finally, Protestants failed to meet their burden of proving that Ms. Watts' should have found Cardinal nonresponsible because they lacked a record of integrity. As stated above, the CPO was not provided with any meaningful analysis or information to justify overriding Ms. Watt's determination. While Mr. Bishop's email correspondence is not everything the CPO might desire of Cardinal in such a situation, Cardinal did communicate to the larger users that it was not currently on the statewide term contract. Further, neither First Choice nor Grove audited the transactions and instead placed the duty to do so on the CPO in a protest proceeding, which is not proper. Protestants claim that they met their burden of proof merely by proving that sales had occurred, but the CPO disagrees. The circumstances surrounding the sales by Cardinal are relevant and were not presented.

Even if Protestants had proven some of the sales made by Cardinal during the relevant period were improper, it is highly unlikely that this would have rendered Ms. Watts' determination unreasonable in light of all the factors. Moreover, it is not surprising that some orders may not have been made immediately to Grove since Grove officials testified that it did not communicate with any state agencies regarding the transfer of their accounts until February 20, 2010, the effective date of Grove's contract. Logically, the transition of hundreds of accounts would require Grove working with each and every contract user to set up the accounts, vet their credit viability of each applicant, educate users on the use of Grove's ordering and billing systems, set up connectivity to Grove's ordering systems, and familiarize each user with Grove's catalog and products.

For the above stated reasons, Protestants failed to prove that Ms. Watts' determination that Cardinal was a responsible bidder was arbitrary, capricious, erroneous or contrary to law. Therefore, this allegation is denied.

Did Cardinal Health 200, Inc. improperly claim the resident vendor preference?

Protestants also claim that Cardinal Health 200, Inc. improperly claimed the resident vendor preference because it did not exist as a corporate entity at the time it submitted its bid. Protestants further contend that even if Cardinal Health 200, Inc. existed it did not qualify for the preference because it does not maintain and own an office in South Carolina and also cannot satisfy the product inventory requirement.

When evaluating pricing for purposes of making an award determination, a preference of seven percent must be provided to bidders who are residents of South Carolina. S.C. Code Ann. § 11-35-1524(B)(6).³ In order to qualify for the resident vendor preference, the Code, in relevant part, requires that a bidder:

- 1) is an individual, partnership, association or corporation that is authorized to transact business within South Carolina;
- 2) maintains an office in South Carolina;
- 3) maintains in South Carolina at the time of the bid an inventory of expendable items which are representative of the general type of commodities on which the bid is submitted having a total value of \$10,000 or more; and
- 4) has paid all assessed taxes.

As explained above, Cardinal Health is authorized to transact business in South Carolina. Moreover, the testimony and evidence indicate that Cardinal Health maintains a fixed office located at 785 Fort Mill Highway in Fort Mill, South Carolina, which is in Lancaster County. At that same location, Cardinal has a facility that assembles surgical kits, which are comprised of medical supplies. At this facility on the date of the bid, Cardinal had approximately \$14 million worth of medical supplies in its inventory at that location. In addition, Cardinal Health employs 600 workers on a routine basis at this location and generates taxable wages of approximately \$4 million within South Carolina. Cardinal Health has paid all assessed taxes in South Carolina, including payroll taxes, any

³ Since this solicitation was issued prior to the first Monday in September 2009, the prior resident vendor preference statute applies.

income taxes or fee-in-lieu, and other property taxes, both to the State and to Lancaster County through 2009. (Ex. 8).

First, the CPO finds that the allegation that Cardinal Health was not entitled to the resident vendor preference because it did not exist is without merit for the reasons stated above. As to the second ground, the CPO concludes that Cardinal Health is authorized to transact business in South Carolina and maintains an office in South Carolina. The statute does not require the bidder to own the office. The CPO further finds that Cardinal Health maintains a facility at this same location in Fort Mill, South Carolina that had at the time of the bid an inventory of expendable items which are clearly representative of the general type of commodities required by this contract. Moreover, the value of this inventory of medical supplies was well over \$10,000. Finally, Cardinal Health has paid all assessed taxes. Therefore, First Choice and Grove have failed to prove that Cardinal Health does not meet all the necessary requirements to qualify for the resident vendor preference. Accordingly, this allegation is without merit and is denied.

DETERMINATION

For the aforesaid reasons, the protests of First Choice and Grove are denied.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

August 23, 2010
Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the General Appropriations Act for Fiscal Year 2010-2011, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

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April 30, 2010

VIA ELECTRONIC AND HAND DELIVERY:

Voight Shealy
Chief Procurement Officer
Materials Management Office
1201 Main Street
Columbia, SC 29201

Re: First Choice Medical Supply, LLC
Bid Protest – Statewide Medical Supplies
Solicitation No.: 540901105
Our File No: 7-2053.100

Dear Mr. Shealy:

This firm represents First Choice Medical Supply, LLC ("First Choice") in connection with the above referenced solicitation. On behalf of First Choice, we hereby protest the intent to award the State Term Contract for Medical Supplies to Cardinal Health 200, Inc. and request a hearing and administrative review. As you know, the Materials Management Office ("MMO") originally posted an Intent to Award to Grove Medical, Inc. ("Grove") and Medline Industries, Inc. ("Medline"). Cardinal Health 200, Inc. and First Choice both protested the award. Following a hearing, the CPO issued a decision granting the protests as to Medline, canceling the award to Medline and dismissing the protest as to Grove. Thereafter, the award to Grove was reinstated. Because the IFB required award to two bidders, MMO then issued an Intent to Award to First Choice. As a result, Cardinal Health 200, Inc. filed a protest of the award to First Choice on the grounds that MMO had conducted an improper preference calculation. Through its decision dated March 29, 2010, the CPO granted Cardinal Health 200, Inc.'s protest and ordered that the Intent to Award to First Choice be canceled and instructed MMO to proceed with the procurement in accordance with the Code. On April 20, 2010, MMO issued a Notice of Intent to Award to Cardinal Health 200, Inc. First Choice, as a bidder in this procurement and, pursuant to S.C. Code Ann. § 11-35-4210(1), has standing to pursue a protest. The protest is based upon the following factual and legal basis:

The Cardinal Health 200, Inc. bid was submitted by Jerry Bishop, who was represented as Territory Sales Consultant for Cardinal Health 200, Inc., with said Cardinal Health 200, Inc. further being represented as a corporation incorporated in the State of Ohio. In its bid, Cardinal Health 200, Inc. requested the SC Resident Vendor Preference and claimed the address of its in-state office as 785 Ft. Mill Hwy, Fort Mill, SC 29715.

Cardinal's unadjusted bid was \$1,729,428. First Choice's unadjusted bid was \$1,626,612. Upon information and belief, subsequent to the CPO Decision of March 29, 2010, MMO applied a preference calculation which resulted in an upward adjustment of First Choice's bid to \$1,740,474. Because Cardinal was the only remaining entity to request resident vendor preference, its bid was not adjusted and MMO determined it was the lowest responsive bidder. MMO then engaged in a responsibility review and determined Cardinal Health was a responsible bidder. For this reason, the propriety of MMO's award to Cardinal Health 200, Inc. is contingent upon on whether Cardinal Health 200, Inc. properly qualified for the Resident Vendor Preference under S.C. Code Ann. § 11-35-1524 as well as whether Cardinal Health 200, Inc. is a responsible bidder.

I. Cardinal Health 200, Inc. does not qualify for Resident Vendor Preference under S.C. Code Ann. § 11-35-1524.

S.C. Code Ann. § 11-35-1524 provides for a preference for bidders that qualify as a resident vendor. A resident vendor is a bidder that:

- (a) is authorized to transact business within South Carolina;
- (b) maintains an office in South Carolina;
- (c) either (1) maintains a minimum of \$10,000 in representative inventory at the time of the solicitation or (2) is a manufacturer which is headquartered and has at least a ten million dollar payroll in South Carolina and the product is made or processed from raw materials into a finished end-product by such manufacturer or an affiliate (as defined in section 1563 of the Internal Revenue Code) of such manufacturer; and
- (d) has paid all assessed taxes.

The Code defines office as "non-mobile place for the regular transaction of business or performance of a particular service and staffed by at least one employee on a routine basis.

First Choice maintains that Cardinal Health 200, Inc. made an improper claim for resident vendor status; and thus, the award should be canceled. Upon information and belief, Cardinal Health 200, Inc. cannot claim resident vendor status because at the time the bid was submitted, it did not meet the qualifications for a resident vendor. First, Cardinal Health 200, Inc. did not exist as a corporate entity at the time the bid was submitted. As such, Cardinal Health 200, Inc. cannot be properly qualified as a resident vendor. Even if it is determined that Cardinal Health 200, Inc.'s corporate status is permissible to seek resident vendor status, it cannot satisfy the requirements set forth in S.C. Code Ann. § 11-35-1524(a)-(d). Cardinal Health 200, Inc. cannot show that it maintains an office in South Carolina. Furthermore, Cardinal Health 200, Inc. cannot satisfy the product inventory requirement set forth in the statute. Cardinal Health 200, Inc. cannot rely on a related entity or affiliate to satisfy the resident vendor requirements. Given the fact that the sole reason for Cardinal Health 200, Inc.'s status as low bid is the application of the resident vendor preference (ie. without the application of the preference First Choice is the low bid), First Choice and the State should be afforded a full and fair opportunity to inquire and put up evidence as to Cardinal Health 200, Inc.'s compliance with the

qualification factors above. Cardinal Health 200, Inc. improperly claimed resident vendor status. The application of the preference placed Cardinal Health 200, Inc. in the low bid position. For this reason, the Intent to Award to Cardinal Health 200, Inc. should be cancelled and MMO should award the second vendor position to First Choice.

II. The Determination that Cardinal Health 200, Inc. was a responsible party is erroneous.

S.C. Reg. 19-445.2125 sets forth the factors to be considered by the State in determining the responsibility of a prospective vendor. They include whether a prospective vendor has:

- (a) available the appropriate financial, material, equipment, facility and personal resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (b) a satisfactory record of performance;
- (c) a satisfactory record of integrity;
- (d) qualified legally to contract with the State; and
- (e) supplied all necessary information in connection with the inquiry concerning responsibility.

First Choice contends that Cardinal Health 200, Inc. is a non-responsible vendor and that the procurement manager's determination that Cardinal Health 200, Inc. was a responsible bidder was arbitrary, capricious and erroneous as a matter of law for the following reasons:

- (A) Cardinal Health 200, Inc. does not exist as a corporate entity and did not exist at the time the bid was submitted. Furthermore, upon information and belief, there has never been a Cardinal Health 200, Inc. organized under the laws of the State of Ohio. As such, they are not qualified legally to contract with the State.
- (B) Cardinal Health 200, Inc. does not have a satisfactory record of performance and integrity and has otherwise breached its obligations of good faith and fair dealing imposed by the Code by knowingly selling to using agencies under the State Contract or otherwise encouraging Using Agencies to purchase off Contract. Upon information and belief, Cardinal Health 200, Inc. has been actively marketing to Using Agencies subsequent to the expiration of its contract with the State and the institution of Grove Medical as the State Contract vendor. This includes encouraging certain Using Agencies to engage in emergency sole source procurements in violation of the Code.
- (C) Cardinal Health 200, Inc. provided no financial information to support a determination that it had the appropriate financial and other resources to meet all contractual requirements. Upon information and belief, the State's review financial review was limited to a Dunn & Bradstreet report that contained no data on Cardinal Health 200, Inc.

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The facts dictate a determination that Cardinal Health 200, Inc. is a non-responsible bidder. MMO's responsibility determination was arbitrary, capricious, based on mistaken and incomplete information. Cardinal Health 200, Inc.'s bid should be rejected, the intent to award cancelled and the award should be made to First Choice.

First Choice maintains that the Resident Vendor Preference was improperly applied to Cardinal Health. The CPO should issue a determination that the award should be made without the application of the Resident Vendor Preference. Additionally and alternatively, Cardinal Health 200, Inc.'s bid should be rejected based on a determination that it is a non-responsible bidder. With the rejection of Cardinal Health 200, Inc. and/or the proper evaluation of the bids without the application of the Resident Vendor Preference to Cardinal Health 200, Inc., the award should be made to First Choice as the lowest responsive responsible bidder. As such, First Choice is requesting the Chief Procurement Officer issue a decision to award the Contract to First Choice.

First Choice will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act request and further investigation. We look forward to the administrative review and hearing of this protest and presenting our proof.

With my kindest regards, I am

Sincerely,


E. Wade Mullins, III

EWM/rdd

cc: John Schmidt, Esq.
Molly Crum, Esq.
M. Elizabeth Crum, Esq.
John Stevens
Guy Edwards

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Via Email to vshealy@mmo.sc.gov and Hand Delivery

Mr. Voight Shealy
Chief Procurement Officer for Goods and Services
Material Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

RE: Protest of Notice of Intent to Award to Cardinal Health 200 Inc, Solicitation No. 5400001105, Statewide Medical Supplies, beginning May 3, 2010

Dear Mr. Shealy:

This firm represents Grove Medical Inc. ("Grove") in connection with the above matter. Grove hereby protests the notice of intent to award (as well as the corrected award notice) the above procurement to Cardinal Health 200 Inc. ("Cardinal"), which notice was posted April 20, 2010. The grounds of this protest are set forth below.

This procurement involves a statewide term contract for medical supplies for all state agencies. Award was to be made to the two lowest responsive and responsible bidders. Grove was low bidder, and was awarded a contract as the low bidder following unsuccessful protests of other bidders, including Cardinal. Grove's statewide term contract commenced February 20, 2010.

Initially, Medline was named the second low bidder. However, upon protest, Medline's award was withdrawn. At that time, award was made to the next lowest bidder, First Choice. However, due to an issue involving the application or calculation of certain legally defined preferences, that award was also withdrawn. As a result, Cardinal was issued the notice of intent to award now at issue.

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This term contract was preceded by other similar term contracts. Cardinal Health was the incumbent for nearly 20 years. Cardinal Health's tenure was extended the last time this contract was solicited even though Grove had then offered the lowest responsive bid during that process. The contract to Cardinal Health during that earlier bid was extended even further, during this bid process, due to protests (including Cardinal's), until the award to Grove was finally put in place, on February 20, 2010.

As of February 20, 2010, Cardinal no longer had a right to sell medical supplies lawfully to state agencies without either a separately solicited contract, or the existence and employment of another lawful purchase method. Cardinal was so informed and advised well in advance of the February 20, 2010 termination date. Even so, Cardinal has continued to sell and solicit sales of medical supplies that are available to state agencies under Grove's existing statewide term contract. Cardinal's wrongful behavior has persisted despite knowledge, notice and warning against such misconduct. And, on information and belief, Cardinal's misconduct has persisted even up to the date of this letter, with almost three months of illegal sales.

Grove protests the notice of intent to award to Cardinal. Cardinal is not the next lowest responsive bidder, and is not a responsible bidder because it has an unsatisfactory record of integrity and is not qualified legally to contract with the state. Cardinal is not a responsive and responsible bidder for the following reasons, among others:

1. Cardinal is not a responsible bidder because it engaged in improper and unlawful activity by directly or through an affiliate knowingly selling to state agencies medical supplies covered by Grove's statewide term contract after February 19, 2010, and failing to prevent such off contract purchases.
2. Cardinal is not a responsible bidder because it encouraged state agencies to buy "off contract" and to establish improper, unlawful contracts (including false "emergency" contracts and wrongly aggregated "small purchase" contracts) in order to violate Grove's rights to make sales to state agencies under the statewide term contract.
3. Cardinal is not a responsible bidder because it did not exist as an entity and/or it was not registered to do business in the state of South Carolina from the date bids were submitted until the present date. Cardinal is simply not legally qualified to contract with the state. Further, Cardinal offered no financials for its own organization, and lacks financials of its own, and the State's Dun & Bradstreet check contains no data at all on Cardinal, but instead only information on Cardinal affiliates which are separately organized under law,

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and which did not sign a bid to render them liable to the state for performance. On information and belief, Cardinal itself does not have sufficient assets to support the contract.

4. Cardinal, on information and belief, is not a responsible bidder because it has been selling product to state agencies either directly or through affiliates without being registered to do business in the state and without paying taxes in the state.

5. Cardinal did not properly claim resident vendor preference.

6. Cardinal is not a responsible bidder and also is not qualified for the resident vendor preference it claimed because, among other things:

- there is no Cardinal Health 200 Inc. or Cardinal Health 200, Inc.;
- Cardinal's affiliates cannot be used to meet required qualifications;
- even if a Cardinal's affiliate could be used to meet the legal qualifications for in state vendor preference and financial viability, on information and belief, no Cardinal Health 200 entity owns the facility relied on by Cardinal to establish the in state location provided in Cardinal's bid;
- the facility that Cardinal relied on in its bid for its in state vendor preference claim does not meet all requirements needed to qualify for the preference.

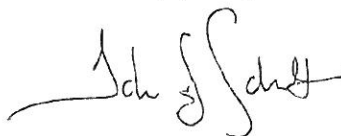
Grove and the state have already been harmed by Cardinal's misconduct in the above matters. Grove has been deprived of valuable sales, and the state has been deprived of the advantages it sought to obtain from the contract it awarded to Grove. Further, Cardinal's misconduct has the plain appearance of being intentional. Cardinal delayed the original hearing of its initial protest of the award to Grove, not attending the originally noticed hearing for the spurious reason that it "didn't know our state handled such business communications by e-mail." That needless delay alone allowed Cardinal to extend the length of the prior, Cardinal Health contract in order to force the state to continue to make purchases of the supplies in question at much higher prices than those offered by Grove under the current valid contract. Since Grove's award was put into place, Cardinal and/or its affiliates has continued to persuade and attempt to persuade its longtime state customers to avoid the lawful contract and continue, regardless, buying from Cardinal. Cardinal on information and belief even prematurely informed agencies that its contract was back in place before the notice of intent to award was made final, and informed

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agencies they could buy from Cardinal before the date the intended contract award was to begin.

Grove has asked the state several times to demand that Cardinal cease and desist such activities. Grove is informed that state personnel have diligently attempted to cause Cardinal to cease, but Cardinal continues to resist, ignoring law and process. It is finally time that Cardinal must reap the consequences of its misconduct. Grove requests a hearing be held after full disclosure of all state data that Grove has requested through FOIA. And Grove asks that the intent to award to Cardinal be cancelled, as Cardinal is not a responsible vendor, and because Cardinal is not, in fact, the next lowest bidder, due to unavailability of the preference to Cardinal. Any contract to Cardinal should be invalidated under S.C. Code Ann. Sections 11-35-4210, 11-35-431, 11-35-1524, and under such other authorities as may be argued by Grove at the hearing of this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John E. Schmidt, III". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

John E. Schmidt, III